No. 43.

Brf. of McComas for D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 43.

THE NORTHERN CENTRAL RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE STATE OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

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(18,037.)

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THE NORTHERN CENTRAL RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

A.

1. The defendant in error brought suit in the superior court of Baltimore city to recover from the plaintiff in error $13,142.35, this sum being a tax of 1 per cent. on the amount of the gross receipts of the plaintiff in error within the State of Maryland for the year ending January 31, 1896, with interest from July 1, 1896, together with 5 per cent. penalty for failure to pay within one month after the last-mentioned date.

The case was tried in said superior court of Baltimore city before Judge Stockbridge. On June 18, 1900, there was a verdict for the plaintiff (defendant in error) for $17,124.17 and judgment on verdict.

On June 20, 1900, the plaintiff in error appealed from the judgment. On December 7, 1900, by the Court of Appeals this judgment was affirmed and execution awarded for debt, interest, and costs. From this judgment the plaintiff in error has appealed to this court.

The assignment of errors committed by said court of appeals, in substance, is that by the act of the General Assembly of Maryland, 1880, chapter 16, and by the acceptance thereof by the plaintiff in error and the doing of the things required by the terms of said act by said plaintiff in error a valid contract upon legal and valuable considerations was entered into between the State of Maryland and the Northern Central Railway Company, whereby said State agreed that no tax should ever be imposed under the laws of said State upon the property, franchises, or gross receipts of said railway company, except an annual tax of one-half of 1 per cent. on the gross receipts of the company within said State.

That said contract was irrevocable except upon the consent of both parties to it, and so is within the protection of section 10 of the first article of the Constitution.

That the State of Maryland by the act of 1890, chapter 559, imposed a tax of 1 per centum per annum for each and every year, and so impaired said contract between the State of Maryland and said railway company.

And that by the judgment of said court of appeals of Maryland now to be reviewed it is determined and adjudged that said last-mentioned act validly imposed upon the plain-

tiff in error a tax of 1 per centum per annum upon its gross receipts in the State of Maryland, and that said last-mentioned act is not repugnant to said provision of the Constitution that no State shall pass a law impairing the obligation of contracts.

The judgment now to be reviewed involved the same questions, decided in the same case, between the same parties, decided by the same court in "The State of Maryland *v.* The Northern Central Railway Company, 90th Md., 497." The court of appeals then reversed the lower court and awarded a new trial. At the retrial of the case judgment was entered for the plaintiff (the defendant in error) and upon the second appeal of the defendant (the plaintiff in error) this judgment was affirmed, and for the error assigned is now sought to be reversed.

2. The question involved in this appeal is important to the State of Maryland. It involves the right of the State to impose the same tax upon the Northern Central Railway Company as is imposed upon other railroad corporations in the State. This suit claims only the tax upon the gross receipts of the plaintiff in error for the year 1896 at the rate of 1 per centum per annum. The question, however, involves the claim of the railroad company to an exemption from taxation for all State and county purposes forever at any rate exceeding half the present uniform rate imposed on all railroads operated by steam.

The tax of one-half of 1 per cent. levied annually upon the gross receipts within Maryland of all railroad companies worked by steam incorporated by Maryland and doing business therein originated with the act of 1872, chapter 234,

amended in particulars not material to be stated by the act of 1874, chapter 408. The Maryland Code, article 81, in section 146, contains this tax provision, and sections 147 to 154, inclusive, make provision for inquisition and collection of the tax.

The act of 1890, chapter 559, increased this tax from one-half of 1 per centum to 1 per centum upon such gross receipts, and the judgment in this case is for 1 per centum of the gross receipts of the plaintiff in error within the State of Maryland for the year ending January 31, 1896.

B.

THE ACT OF 1880, CHAPTER 16, IS NOT AN IRREPEALABLE CONTRACT, BUT WAS SUBJECT TO REPEAL BY A SUBSEQUENT LEGISLATURE.

THIS APPEARS FROM THE HISTORY OF THE CHARTERS OF AND OF THE TAX LAWS OF MARYLAND RELATING TO THE NORTHERN CENTRAL RAILWAY COMPANY.

In State *v.* Northern Central Railway Company, 44th Md., 131, 160, the Maryland court of appeals summarized such history.

The Baltimore and Susquehanna Railway Company was chartered in 1827 by the State of Maryland to construct a railroad from the city of Baltimore to the Susquehanna river. By the Maryland act of 1854, chapter 250, the stockholders of the last-mentioned company were authorized to unite and consolidate with "the York and Maryland Line Railroad Company," "the York and Cumberland Railroad Company," and "the Susquehanna Railroad Company," corporations chartered by Pennsylvania, so as to form one

corporation, "the Northern Central Railway Company," subject to certain conditions set forth in said act. Among others were these conditions:

That the consolidated company should have power to establish its capital stock to an amount not exceeding $8,000,000.

That the said company should possess all the corporate powers and privileges and be subject to all the duties and obligations, not inconsistent with the act and its general intent, which were expressed in the charter granted to the Baltimore and Susquehanna Railroad Company or in the supplements to that charter.

The act provided that it should go into effect whenever the several corporations had agreed to consolidate their several companies into one and had agreed upon the terms and conditions of such consolidation and had made a full report thereof, duly certified to the governor of Maryland, to be recorded in the office of the secretary of state.

Like power to consolidate with the Baltimore and Susquehanna Railroad Company was granted to the three Pennsylvania companies before mentioned by the legislature of that State. The act of 1854, chapter 250, was accepted in accordance with the terms of the act by the stockholders of the Baltimore and Susquehanna Railroad Company, and articles of union were executed by which all the property rights, privileges, and immunities belonging to the said several companies were transferred to the Northern Central Railway Company.

By the charter of the Baltimore and Susquehanna Railroad Company the act of 1827, chapter 72, section 20, it was provided that the shares of the capital stock of the said

company should be deemed and considered personal estate and be exempt from the imposition of any tax or burthen.

In State *v.* Northern Central Railway Company, 44th Md., 162, it was therefore claimed by the present plaintiff in error that as the act of 1854, chapter 250, provides that the Northern Central Railroad Company should possess the corporate powers and privileges granted to the Baltimore and Susquehanna Railroad Company by the act of 1827, chapter 72, it follows that the capital stock which the Northern Central Railway Company was authorized to issue under the act of 1854, chapter 250, is exempt from taxation, and, since the shares of stock represent all the property of the company, all such property is also exempt, and the question in 44th Md., 162, was whether the exemption thus claimed was beyond the power of the legislature to repeal.

C.

THE COURT OF APPEALS OF MARYLAND IN STATE V. NORTHERN CENTRAL RAILWAY COMPANY, 44TH MD., 162, DECIDED THAT IT WAS NOT WITHIN THE POWER OF THE LEGISLATURE UNDER THE STATE CONSTITUTION OF 1851 TO GRANT TO THIS COMPANY IMMUNITY FROM TAXATION OR ANY OTHER CORPORATE PRIVILEGE BEYOND THE POWER OF A SUBSEQUENT LEGISLATURE TO REPEAL OR REVOKE.

THAT ITS CHARTER EXEMPTION FROM TAXATION (ACT 1854, CHAPTER 250) WAS REPEALED, AND A STATE TAX OF ONE-HALF OF 1 PER CENTUM UPON THE GROSS RECEIPTS WAS VALIDLY IMPOSED UPON THIS COMPANY.

In the last-mentioned case it was held—

That under the State constitution then in force the charter of the Baltimore and Susquehanna Railroad Company, the act

of 1827, chapter 72, must be regarded as an executed contract between the State and the corporators, the obligation of which contract the State could not impair by any law.

That by the act of 1854, chapter 250, when accepted by the stockholders, the Baltimore and Susquehanna Railroad Company was merged into the Northern Central Railway Company, to which it had transferred all its rights and property. Its capital stock having been extinguished, its board of directors having ceased to exist, all its corporate powers and privileges vested in the consolidated company and the Baltimore and Susquehanna Railroad Company as a corporation ceased to exist.

That in its place and in the place of the three Pennsylvania companies a new corporation was created. The corporate rights and privileges of the Baltimore and Susquehanna Railroad Company and the provisions of the act of 1827, chapter 72, were to that extent embodied in and reenacted by the act of 1854, chapter 250. The rights and privileges thus conferred became new and special grants to the Northern Central Railway Company, but in no sense was the Northern Central Railway Company created by the articles of union executed by the respective companies. The acceptance by the stockholders of the act of 1854, chapter 250, and the execution of the articles of union were conditions precedent to the incorporation of the new company, and when these conditions were complied with the Northern Central Railway Company as a corporation derived its existence and was in terms created by the operation of the act of 1854, chapter 250.

That when this last-mentioned act was passed the constitution of 1851 was in force in Maryland and ordained "that

corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section, may be altered from time to time or repealed," &c. (sec. 47, art. 3). The constitutions of 1864 and 1867, hereafter mentioned, each contains a similar provision:

That the Northern Central Railway Company deriving its charter from the act of 1854 when the constitution of 1851 was in force and the exemption from taxation claimed being a part of such charter, the power of the legislature to repeal or revoke the immunity thus granted is too clear to be questioned. That under the provisions of the constitution quoted the right to alter, amend, or repeal every charter granted by the legislature to a private corporation is reserved as fully as if such reservation had been made in express terms in the charter itself.

That it was not within the power of the legislature under the constitution of 1851 to grant to the Northern Central Railway Company immunity from taxation or any other corporate privilege beyond the power of a subsequent legislature to repeal or revoke.

That the act of 1866, chapter 157, provides in general terms for the taxation of all property in the State and repeals all laws exempting property from taxation.

That the act of 1870 provides: "That all and every provision contained in the charter, or supplements thereto, of any railroad company incorporated by the laws of this

State, or contained in any law heretofore passed by the legislature of this State, whereby the stock or property, real or personal, of any railroad company * * * is exempted from taxation, be, and the same is hereby repealed."

That the act of 1872, chapter 234, provides "that a State tax of one-half of one per centum be, and the same is hereby, levied annually upon the gross receipts of all railroad companies worked by steam."

That the provisions of the three several acts before referred to are repugnant to and inconsistent with the continuance of the exemption from taxation granted to the Northern Central Railway Company by the act of 1854, chapter 250, and must be construed as a repeal of the provisions of said act of 1854, under which the immunity from taxation claimed by the Northern Central Railway Company is derived, and therefore the tax imposed by the act of 1872, chapter 234, upon the gross receipts of the company was a valid tax.

Therefore the judgment in 44th Md., 169, in favor of the Northern Central Railway Company was reversed by the court of appeals, and the case was sent back in March, 1876, to be retried in the superior court of Baltimore city, where the case was pending at the time the act of 1880, chapter 16, was passed.

D.

THE ACT OF 1880, CHAPTER 16, IS A SUPPLEMENT TO THE CHARTER OF THE NORTHERN CENTRAL RAILWAY COMPANY, THE ACT OF 1854, CHAPTER 250. IT IS NOT BEYOND THE POWER OF SUBSEQUENT LEGISLATURES TO ALTER OR REPEAL.

1. The Maryland constitution of 1867, article 3, section 48, ordains that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this act shall be void." * * * "All charters granted or adopted in pursuance of this section and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time or be repealed."

The Maryland act of 1880, chapter 16, is in the transcript of record, pp. 12, 13, 14. In its title it is described as "*An act supplementary to the act of eighteen hundred and fifty-four, chapter two hundred and fifty,* entitled An act to authorize the consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company by the name of the Northern Central Railway Company." It is true the title, besides describing this statute as an act supplementary to the charter of the plaintiff in error, "the act of 1854, chapter 250," describes this supplementary act as "An act to adjust and settle finally by agreement all pending controversies

between the State of Maryland and the Northern Central Railway Company." But the title characterizes the act as supplementary to the charter—to that act which was held by the court of appeals in 44th Md., 163, to constitute the charter of the Northern Central Railway Company. If the act of 1854, chapter 250, be not its charter, the Northern Central Railway Company for a half century has done business without a charter. The constitutional requirement that every law shall embrace but one subject and that shall be described in the title is satisfied if the supplemental act identifies the original act by its title and declares the purpose to amend or supplement it. If there be a doubt from the act itself, the title makes plain the intent that this statute is an act supplementary to the charter, as Chief Justice Marshall, 2d Cranch, 358, 386, said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

The Maryland court has thus recently stated the rule of construction: "While the title will not be permitted to control the express language of the act, yet if the language be somewhat obscure or doubtful it may be considered to aid in the interpretation of the act, and thereby give to the enacting clause a meaning consistent rather than at variance with the clear title of the act" (State *v.* Archer, 73 Md., 44.)

The best answer to an ingenious argument which bases the alleged contract and its consideration upon the language of the preamble is in The Yazoo Railroad Company *v.* Thomas, 132 U. S., 174, 188: "The preamble is no part of the act; it cannot enlarge or confer powers, nor control the words of the act unless they are doubtful or ambiguous."

2. IT IS DOUBTFUL WHETHER THE ACT OF 1880, CHAPTER 16, THE SUPPLEMENT TO THE CHARTER, ACT OF 1854, CHAPTER 250, GRANTED ANY EXEMPTION FROM TAXATION; TAXATION IS THE RULE, EXEMPTION IS THE EXCEPTION; IT WILL NOT BE ENLARGED BY CONSTRUCTION.

IT IS SUBMITTED THAT SAID ACT DID NOT GRANT AN IRREPEALABLE EXEMPTION FROM TAXATION.

If the act of 1880, chapter 16, be a public grant, it must be strictly construed. Nothing can be taken against the State by presumption or inference. The intent of the legislature to confer the immunity from taxation or limit the amount or rate of taxation must be clear beyond a reasonable doubt. The established rule is that immunity not expressly granted is reserved.

The act of 1880, chapter 16, is plain and unambiguous. Not the preamble, but the enacted sections, must contain the contract if there be a contract. If it be urged, as it must be, that the act contains the contract of exemption and that it is plain and unambiguous, "the preamble cannot enlarge or confer powers nor control the words of the act;" cannot import a consideration into the act, cannot add a term to the contract, cannot make a contract, if the act does not contain the contract of exemption.

If there be a limited exemption from taxation *forever* and it be irrepealable, it is to be found in the first section of the act, which reads thus (Record, p. 13): "*Be it enacted by the General Assembly of Maryland*, That the Northern Central Railway Company shall have and possess all the powers, rights, privileges, *and immunities*, and be subject to all the duties and obligations which are expressed in the act of as-

sembly of Maryland of eighteen hundred and twenty-seven, chapter seventy-two, entitled An act to incorporate the Baltimore and Susquehanna Railroad Company, but all the franchises and property of every description and gross receipts of said Northern Central Railway Company, within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon the gross receipts from its railroad and branches lying within the State of Maryland, and from all other sources within this State, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland; *provided however* that all such property works and structures of the said Northern Central Railway Company, which are or may be taxable within the meaning of the decision of the court of appeals of Maryland rendered in the year eighteen hundred and seventy-eight in the case of the State of Maryland against the Baltimore and Ohio Railroad Company, shall be subject to taxation for county and municipal purposes in the same way and to the same extent as the property of individuals."

Is there an exemption herein? If there be, is there an exemption for all time? Is there a plainly expressed intent never to amend or repeal it? In Covington *v.* Kentucky, 173d U. S., 231, 238, the act by which it was claimed that a certain exemption from taxation was granted to the city of Covington "in its proprietary, as distinguished from its governmental character," the grant of exemption was far more favorable than the alleged grant of exemption in this act (1880, ch. 16), yet Mr. Justice Harlan said: "We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of

Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation." * * * "There was in the act no 'plainly expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, etc., * * * should be *forever* exempt from State, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired."

The words contained in the act of 1880, chapter 16, upon which this exemption is claimed, provide that the company "shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum upon its gross receipts from its railroad and branches lying within the State of Maryland, and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland," coupled with a proviso regarding taxation for county and municipal purposes. The meaning of the word "extent" is primarily dimension or degree; the limit, compass, or range. It is submitted that these words "shall be subject to taxation for State purposes *to the extent* of an annual tax of one-half of one per centum upon gross receipts" *do not constitute a perpetual exemption from any higher tax.* The only remaining words are, and these constitute plainly what was intended by the exemption, that the franchises, property, and gross receipts of said company shall not be subject to "any other tax under the laws of the State of Maryland." It is clear from the text of the proviso that *this* "OTHER TAX" *means an immunity from taxation for county and municipal purposes.* One of the important questions

raised by the company as to its liability was regarding county and municipal taxation. It would be a forced construction to give to the word "other" a different meaning from its ordinary acceptation, and construe it as equivalent to the word "greater," as applicable to taxation for State purposes, which is the subject of this taxation upon the gross receipts. That the words "any other tax" were intended to apply to county and municipal taxation is a reasonable and proper construction. It is not reasonable, we submit, nor within the strict construction of tax exemptions by this court, to construe these two phrases as indicating an intent of the legislature that no further or different tax should be subsequently levied. "When the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power" (146 U. S., 279, 294, *ubi supra*). "An immunity from taxation by a State will not be recognized unless granted in terms too plain to be mistaken," said Mr. Justice Parkham in Phœnix Insurance Co. *v.* Tennessee, 161 U. S., 174, 177.

By reference to the original charter of the Northern Central Railway Company, the act of 1854, chapter 250, it will appear that the clause therein conferring corporate powers upon the company is in the identical language of the grant set forth in the above first section except that the act of 1880, chapter 16, section 1, adds the word "immunities" to the charter rights and privileges, and then at length confers the alleged exemption claimed by the plaintiff in error. This grant of "immunities" makes this a supplement to the charter. The alleged exemption on its face is merely an imposition upon the Northern Central Railway Company of the same tax upon gross receipts imposed upon all rail-

roads worked by steam. The fair meaning from the context of the clause "and said franchises, property and gross receipts shall not be subject to any other tax under the laws of the State of Maryland" is that the company shall not be subject to any other tax, county or municipal, except such county or municipal tax as is permitted by the proviso to this section, *that no other mode of taxation under existing law* should be applied to this company, and the tax on gross receipts should be in lieu of all other taxes for State purposes. It is plain that "any other tax under the laws of the State of Maryland" *means existing laws, laws in force.* The proviso which concludes the section limits the words above "any other tax" and subjects property works and structures of this company to taxation for county and municipal purposes in the same way as the property of individuals, *speaks of existing laws.* Nothing suggests an exemption from taxation under the laws which may be passed hereafter or the intent to exempt the company from different taxation under future revenue laws. This first section which confers the alleged exemption from taxation contains words of current law and not of irrepealable contract. There are no words of contract or agreement, but instead words of express grant of powers, privileges, and immunities usual in charters or amendments to charters.

Sections second and third of this act provide for the payment of $29,762.66, stated to be the total due for State taxes by said company up to December 31, 1879. These sections require the payment of one-half of 1 per centum of gross receipts, a full compliance with the requirements of existing revenue laws.

Section 4 makes plain that this act is a supplement to

the charter of the company. It follows the method prescribed by the charter, the act of 1854, chapter 250. It requires that the *acceptance of this act shall be made by the stockholders of the company at a general meeting of the same, "the acceptance to be evidenced by an instrument in writing under the corporate seal of said company which shall be filed in the office of the secretary of state of Maryland."*

This section clearly indicates the intent of the legislature to regard this act as an amendment to the charter. It is the same method whereby the legislature required the stockholders to evidence the acceptance of the charter, 1854, chapter 250. The usual mode of accepting an amendment of a charter is by a vote of the stockholders.

Since the acceptance of the charter by a vote of the stockholders was required by the act of 1854, chapter 250, and the legislature, by act of 1880, chapter 16, granted "immunities" and imposed a State tax of one-half of 1 per centum by the latter act, which is in terms an act supplementary to the former act, the legislature understood that the amendment to the charter should be accepted in the same manner as the charter itself had been, by a vote of the stockholders. The legislature understood that, although acceptance of an amendment to a charter might be inferred from an exercise of the powers granted, customarily acceptance should be proved by a vote of the stockholders. A charter is a contract; the amendment of that charter is an alteration of that contract. It was reasonable to require the acceptance of both to be evidenced in the same manner—by a vote of the stockholders.

If the claim of the plaintiff in error that this act made an irrepealable contract upon considerations before recited

in this act were well founded, the remaining sections would reasonably give a pledge of immunity from a different method or greater rate of taxation in the future, or prohibit the like. Instead, section 5 (Record, p. 14) enacts that upon the compliance of the company with the provisions of the third and fourth sections of this act, all claims for the unpaid State taxes are discharged, all suits being dismissed. The sixth section is not material here.

In all six sections what is there to suggest a contract exempting the company from any future additional tax? The act is a provision amending the charter and conforming its immunities to current revenue laws. In the words of this court in The Delaware Railroad Tax, 18th Wallace, 206, 226:

"That provision is not accompanied with any words indicating the intent of the legislature that no further or different tax should not be subsequently levied. Had the provision in question been embodied in an independent act, no one would pretend that the designation of the amount and character of the tax carried with it any implication that the tax should remain unchanged in these particulars for all future time during the existence of the corporation."

E.

TESTED BY THE WELL-SETTLED RULE SO OFTEN REITERATED BY THIS COURT, THE ACT OF 1880, CHAPTER 16, DOES NOT CONSTITUTE AN IRREPEALABLE IMMUNITY FROM ADDITIONAL OR GREATER TAXATION. A FEW OF THE RECENT STATEMENTS OF THIS RULE OF CONSTRUCTION ARE HERE QUOTED.

In Citizens' Savings Bank *v.* Owensboro, 173 U. S., pp. 634, 644, Mr. Justice White said: "In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from being irrevocable."

In Covington *v.* Kentucky, 173 U. S., p. 231 (238, 239), Mr. Justice Harlan said: "There was in the act no 'plainly expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from State, county, and city taxes. But such a provision falls short of

a plain expression by the legislature that at no time would it exercise the reserved power amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

In Ford *v.* Delta and Pine Land Company, 164 U. S., pages 662, 666, Mr. Justice Brewer said: "It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim for exemption can be sustained unless within the express letter of the necessary scope of the exempting clause" (and cases cited).

In Yazoo Railroad Co. *v.* Thomas, 132 U. S., pages 175, 185, Mr. Chief Justice Fuller said: "And the court took occasion to reiterate the well-settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended

beyond the exact and express requirements of the language used, construed *strictissimi juris*."

And again the Chief Justice said in Wilmington and Weldon Railroad *v.* Alsbrook, 146 U. S., 279, 294: "The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power."

In Hoge *v.* Railroad Co., 99 U. S., pp. 348, 354, Mr. Justice Fields said: "The power of the legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its existence, but so as to be beyond the control of the taxing power of succeeding legislatures, has been asserted in several cases by this court, although against this doctrine there have been earnest protests by individual judges. But though this power is recognized, it is accompanied with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the legislature, it must be solved in favor of the State."

F.

IF THE AFOREGOING CONSTRUCTION OF THE ACT OF 1880, CHAPTER 16, BE CORRECT, THE RECORD INVOLVES SOLELY AN INTERPRETATION OF THE CONTRACT AND PRESENTS NO FEDERAL QUESTION FOR REVIEW.

If our construction of the act of 1880, chapter 16, be correct, even though the court of appeals gave a judgment of like effect, though upon other grounds; if by the just interpretation of the alleged contract there was no exemption from taxation, then there is no Federal question to be here reviewed. If there was no exemption, then the act of 1890, chapter 559, did not repeal the exemption which did not exist. If there was an exemption, it was not irrepealable and it was repealed.

It is within the principle, if not the expression, in St. Paul Gas Co. *v.* St. Paul, 181 U. S., 151: "As it is apparent that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows *that the record involves solely an interpretation of the contract*, and, therefore, presents no controversy within the jurisdiction of this court."

G.

ASSUMING FOR ARGUMENT SAKE THAT THE MARYLAND LEGISLATURE OF 1880 HAD THE POWER TO MAKE AN IRREPEALABLE CONTRACT FOR A GOOD AND SUFFICIENT CONSIDERATION TO EXEMPT THE NORTHERN CENTRAL RAILWAY FROM TAXATION, NEVERTHELESS THE TERMS OF THE ACT OF 1880, CHAPTER 16, AND THE FACTS IN EVIDENCE SHOW THAT THERE WAS NO LEGAL OR VALUABLE CONSIDERATION FOR SUCH CONTRACT.

A charter is a contract between the corporators and the State made upon valid and sufficient consideration. The Northern Central Railway Company had for thirty-six years as a corporation possessed and exercised the powers, rights, and privileges granted by the act of 1854, chapter 250, declared by the court of appeals in 44th Md., 163, to be its charter.

The only possible considerations for the contract of exemption claimed are found in the preamble. If, as we contend, the act be plain and unambiguous, "the preamble is no part of the act. It cannot enlarge nor control the words of the act unless they are doubtful or ambiguous." If we assume the act to be doubtful or ambiguous, then the plaintiff in error may claim there are three considerations moving from the railroad company, and that, severally or all together, they constitute a legal or valuable consideration for the alleged contract of the company with the State:

1. The controversy between the company and the State respecting the exemption from taxation granted the company by its charter.

2. The right to have the question at issue between the company and the State carried to the Supreme Court, there to be decided.

3. The payment of the sum of $29,762.56.

(*a.*) This alleged contract is in writing, wherefore only such consideration as is set forth in the written instrument, the act of assembly, could be taken to be proved in the transaction in the court below. Where a different kind of consideration cannot be proven only a failure of consideration can be shown.

(*b.*) The written words do not make the controversy a consideration; the written words merely recite the transaction and the willingness of one disputant to pay in accordance with the existing tax laws and admitting its willingness to pay the amount due thereunder.

"A plea stating merely that the amount was in dispute, and that the debtor agreed to pay it in consideration of a promise by the creditor does not set forth a sufficient consideration" (Emmettsburg Railroad Company *v.* Donoghue, 67 Md., 383).

(*c.*) The payment of the sum of $29,762.56 is expressly stated to be in full satisfaction and discharge of all claims arising under the laws of Maryland for taxes against the company up to December 31, 1879. As the record shows, the court of appeals had decided four years before that the company was liable for these taxes. The amount of tax and the manner of its ascertainment were not in dispute. An agreement to take a less sum than the debt is not a good

consideration for another promise for the payment of the residue.

"Payment of part of a debt is neither in law nor in equity a good consideration for abandoning claim for the residue" (Gurley *v.* Hiteshue, 5 Gill, 217).

"An agreement to relinquish the interest due on the debt to obtain payment of the principal is without consideration, and the creditor may recover such interest" (67 Md., *supra*).

(*d.*) The remaining claim is the right to carry the question at issue between the company and the State to the Supreme Court for decision. The alleged contract is a claim of exemption from taxation, and therefore to be most strictly construed in favor of the State. From the undisputed evidence it appears that at the time when the alleged contract was made there was no subsisting right of the railroad company to carry this question to the Supreme Court. At that time the case had not been prosecuted to judgment in the lower court. No writ of error to the Supreme Court would lie until the entry of the judgment in the lower court and until after its affirmance by the court of appeals. Strictly this claim is no legally sufficient consideration to support the alleged contract. The legislature has no judicial functions. The court of appeals had decided that the company was liable to pay the tax. If the Supreme Court be of the same opinion, then there was no doubt upon the question at the time the law was enacted.

If there be no consideration the exemption is a mere gratuity, revocable at the pleasure of the legislature. It has no higher character, because one of the parties was a State,

the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed, or recalled at pleasure (Tucker *v.* Ferguson, 22d Wallace, 527, 574; Appeal Tax Court, etc., *v.* Grand Lodge, etc., 50th Md., 429).

H.

THE COURT OF APPEALS IN 44TH MARYLAND HAVING DECIDED THAT THE CHARTER EXEMPTION FROM TAXATION OF THE NORTHERN CENTRAL RAILWAY COMPANY HAD BEEN VALIDLY REPEALED, IF THAT DECISION NOT APPEALED FROM BE A CORRECT STATEMENT OF THE LAW, THEN A CONTRACT BY 1880, CHAPTER 16, TO EXEMPT THIS ONE RAILROAD OPERATED BY STEAM FROM THE UNIFORM TAX IMPOSED UPON ALL OTHER RAILROADS OPERATED BY STEAM WOULD BE A VIOLATION OF SECTION 15 OF THE BILL OF RIGHTS OF THE MARYLAND CONSTITUTION AND OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The court of appeals of Maryland has interpreted the 15th section of the bill of rights as requiring tax laws to be uniform so as to operate equally upon all persons in similar circumstances. In State *v.* P. R. R. Co., 40th Md., 50, the court said: "It was not deemed a sufficient guarantee that no tax should be imposed but by the representatives of the citizen in the legislature, but in order to prevent abuse of the power, which would otherwise be unlimited, *the legislature is required to cause all public taxation for the support of the government to be fair and equal in proportion to the value of the property assessed, so that no class or species of property shall be unequally or unduly taxed.* And this declaration of the

right of the citizen is not simply directory to the legislature, to be observed or not as that department of the government may determine or think proper; but it is a positive limitation or restriction on the power, *and whenever it is transcended or disregarded, it becomes the duty of the courts to declare the act void.* Hence this court has repeatedly declared that taxes, if imposed in violation of this fundamental rule, would be illegal and void."

The Supreme Court says the fourteenth amendment does impose a practical and effective restraint against unequal taxes upon property of the same kind in the same condition *and used for the same purpose. It requires that the power of taxation shall be exercised impartially and by equal laws, and that taxes shall be imposed proportionately upon all persons and corporations properly within the same class, owning like property, or exercising like rights under substantially similar conditions.* As was said by Mr. Justice Matthews in the Kentucky railroad tax cases, 115 U. S., 321, 337, "the rule of equality in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances," or, as Chief Justice Fuller said in Giozza against Tiernan, 148 U. S., 657, 662, "it is enough that there is no discrimination in favor of one as against another of the same class."

Therefore if the Maryland court in 44th Md. rightly decided that the tax exemption of this company had been validly repealed, and if then by 1880, chapter 16, the State entered into a contract with this company, a railroad operated by steam, chartered since the constitution of 1851 and in reference to which the power of the State to tax is un-

questionable, and subsequently this company proposed to pay arrears of taxes at the same rate annually paid by other railroads operated by steam, and thereupon the State made a contract that thereafter this railroad operated by steam should be subject to a rate of taxation lower than the rate to which other railroads operated by steam might become subject, and thereafter the State did impose half the rate upon this railroad and the whole rate upon all other railroads operated by steam, is it not manifest that such a contract would be void under the provision of the Maryland bill of rights heretofore mentioned and a violation of the clause of the fourteenth amendment prohibiting a State from denying to any person the equal protection of the laws?

I.

THE SUPREME COURT EXERCISES AN INDEPENDENT JUDGMENT, BUT WILL RESOLVE ANY REASONABLE DOUBT IN FAVOR OF THE CONSTRUCTION OF THE CONSTITUTION AND THE STATE STATUTES WHICH HAS BEEN ADOPTED BY THE COURT OF LAST RESORT IN THAT STATE.

THE MARYLAND COURT OF APPEALS HAS UNIFORMLY HELD IN RESPECT TO THE RIGHT "TO REPEAL, ALTER, OR AMEND," UNDER THE CONSTITUTIONS OF 1851 AND 1867, THAT ANY STATUTE WHICH GRANTS TO A CORPORATION IMMUNITY FROM TAXATION, WHETHER IT BE A CHARTER, AN AMENDMENT TO A CHARTER, OR A LEGISLATIVE CONTRACT, IS A STATUTE PASSED SUBJECT TO THIS CONSTITUTIONAL RIGHT, AND THEREFORE SUBJECT TO ALTERATION OR REPEAL BY SUBSEQUENT LEGISLATURES.

1. The court of appeals in the clear and able opinion of Schmucker, J., in The State of Maryland against The North-

ern Central Railway Company, 90th Md., 447, says: "This court in the opinion in the case in 44th Md. in commenting upon the effect of the constitution of 1851, upon the act of 1854, say: 'In accepting the act of 1854 and in the execution of the articles of union under the operation of which the Baltimore and Susquehanna railroad has merged and ceased to exist, the stockholders are presumed to have known that the corporate powers and privileges granted by that act to the Northern Central Railway Company were subject to the provisions of sec. 47, art. 3, of the constitution and that the exemption from taxation claimed under that act was liable to be repealed by the legislature whenever in its judgment the public interest required it. *Be that, however, as it may, it was not within the power of the legislature under the constitution of the State to grant to the appellee immunity from taxation or any other corporate privilege beyond the power of subsequent legislatures to repeal or revoke.' It is to be observed that the court does not rest the inability of the legislature to grant to a corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of want of power in the legislature under the constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and is therefore subject to alteration or repeal by future legislatures.*

If this construction of the constitution be correct, how can we escape the conclusion that the legislature of 1880 had no

greater power, by the passage of the act upon which the appellee bases its claim to a partial exemption from taxation, to grant that exemption in an irrepealable form, than the legislature of 1854 had to grant a total exemption in like form by the act which it passed and which this court has held to be subject to repeal at any time? The appellee attempts to answer this query by calling attention to the fact that the act of 1880 differs from that of 1854 in the essential particular that it, upon its face and especially in its preamble, professes to have been passed for the purpose of adjusting and settling by agreement the controversies which were then pending between the State and the appellee in reference to the extent and validity of the claims of the latter to exemption from taxation, and that the contents of the act itself show that the appellee in accepting it and complying with its terms gave up a valuable right of appeal to the United States Supreme Court, and paid a large sum of money to the State, thus supplying a valid consideration which made the action of the State binding and permanent. Without going into the contents of the act in detail or fully reciting things done upon the faith of it by the appellee, it may be conceded that, if there were no constitutional difficulty in the way, the transaction between the State and the appellee, as part of which the act of 1880 was passed, was one so far in the nature of a contract or agreement that neither party could abrogate it without the consent of the other.

The difficulty with the appellee's contention is that the inability of the legislature under the constitution to make in 1880 a valid and irrepealable grant of such a corporate privilege as immunity from taxation did not rest upon the want of a suffi-

cient consideration for the grant, but upon the fundamental want of the power in the legislature to make it by reason of the provisions of the constitution, which is the supreme and controlling law of the land. It is plain, therefore, that the question of consideration *vel non* cannot be a controlling one in determining the question now at issue. If, as this court has decided in 44th Md., the appellee, in executing the articles of union under the act of 1854, must be presumed to have known that the privileges granted by that act were subject to the provisions of the constitution and repealable at any time, so must the appellee, in accepting the provisions of the act of 1880, be presumed to have known that the immunity from taxation granted by that act was in like manner and for the same reasons subject to repeal by future legislatures."

2. We submit that the decision of the Maryland court of appeals that:

1. The act of 1854, chapter 250, created a new corporation, the plaintiff in error.

2. That it was not within the power of the legislature under the constitution of 1851 to grant to the plaintiff in error immunity from taxation by any form of law beyond the power of a subsequent legislature to repeal or revoke.

3. That by sundry revenue laws the exemption from taxation in the charter of plaintiff in error was repealed.

4. That a State tax of one-half of 1 per centum of the gross receipts was lawfully assessed and payable (for the year sued for) by the plaintiff in error.

5. That none of these statutes were laws impairing the obligation of contracts.

6. That the act of 1890, chapter 16, is a supplement to the charter of the plaintiff in error granting a partial exemption from taxation.

7. That the same constitutional provision respecting "alteration or appeal" was in force when the charter and when the supplement to the charter were enacted, and no irrepealable grant of exemption from taxation was within the competency of the legislature to enact either time.

8. That any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and therefore subject to alteration or repeal by subsequent legislatures.

9. That this rule applies whether 1880, chapter 16, be considered an amendment to the charter of or a legislative contract with the plaintiff in error.

10. That for this reason the question of a legal or valuable consideration is unimportant.

11. That the act of 1890, chapter 559, repealed the exemption from taxation enjoyed by the plaintiff in error under the act of 1880.

12. That the act of 1890, chapter 559, imposed a tax of 1 per cent. upon the gross receipts within the State of Maryland of the plaintiff in error.

It is submitted that the Maryland court of appeals did not err in deciding the main proposition that the old corporations were destroyed and a new one created by 1854, chapter 250, which is the charter of the plaintiff in error.

In cases quite similar it appears the Supreme Court announced a like conclusion.

Shields *v.* Ohio, 95th U. S., 319, 322, 323, 324.

Railroad Company *v.* Georgia, 98th U. S., 359, 362, 363, 364, 365.

Keokuk and Western Railroad *v.* Missouri, 157th U. S., 301, 305, 308, 309, 310, 312.

3. If it is urged by the plaintiff in error that the court of appeals of Maryland, in 90th Md., p. 447, makes too broad a statement in saying that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the constitution referred to, and is therefore subject to alteration and repeal by future legislatures, it must be remembered that the court is speaking of the act of 1880, chapter 16, which by its title is declared to be an act supplementary to the act of 1854, chapter 250. *That the court decided that the former act was an amendment to the latter act, the charter of the plaintiff in error,* and that since it was not competent for the legislature to grant to the plaintiff in error an irrepealable exemption from taxation by the act of 1854, its charter, it was not competent for the legislature to grant to the plaintiff in error an irrepealable exemption from taxation by the act of 1880, chapter 16, "which was supplemental to or amendatory of the former act," its charter.

The court of appeals of Maryland decided, without regard

to the form of law, that an act which extends a grant to this corporation to include "*immunities*," "as well as all the powers, rights and privileges" which are expressed in the act of 1827, ch. 72," the precise grant in the charter, and adds to this a *specific* grant of a limited immunity from taxation, is an act within the constitutional power of a future legislature to alter or repeal.

This construction by the court of appeals that this statute is within the constitutional prohibition, and that such acts are construed to be supplements to charters and therefore deemed to be repealable, is a most reasonable construction. This court will resolve any reasonable doubt in favor of this construction adopted by the court of appeals of Maryland.

4. It is submitted that all other of these rulings are reasonable, and that the claim of an irrepealable exemption is doubtful.

That as the Supreme Court has said, in Hoge *v.* Railroad Company, 99th U. S., 348, 355: "The intention of the legislature to grant immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty and is essential to every independent government. Whoever therefore claims a surrender must show it in language which will admit of no other reasonable construction. If a doubt arises as to the intent of the legislature it must be solved in favor of the State."

The case of the plaintiff in error fails. If not, it is at least doubtful, and the doubt should be resolved in favor of the State.

This is precisely a case wherein a reasonable doubt should be resolved in favor of the construction of the numerous State statutes which has been adopted in this controversy by the court of appeals of Maryland.

It was said by Mr. Justice White in Board of Liquidations, &c., *v.* Louisiana, 197th U. S., 638:

"When the jurisdiction of this court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract which it is alleged has been impaired arises from a State statute, as said in Burgess *v.* Seligman, 107 U. S., 20, 34, '*for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubts.*'"

And again with emphasis was the rule stated by Mr. Justice Brown in Yazoo and Mississippi Valley Railroad Co. *v.* Adams, 181st U. S., 582, 583:

"Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the Constitution, we do not feel called upon to decide. The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24th of that year are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such stat-

utes, and the settled rule of this court *is that even in a case where we may exercise an independent judgment any reasonable doubt will be resolved in favor of that construction of the State statutes which has been adopted by the court of last resort in that State"* (Burgess *v.* Seligman, 107th U. S., 20; Floyd *v.* Comm., 109th U. S., 371–379; Clark *v.* Bever, 139th U. S., 96; Board of Liquidations *v.* Louisiana, 179th U. S., 622).

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